United States Court of Appeals

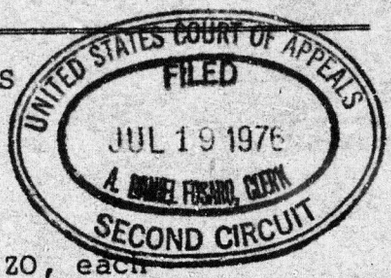
for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL

76-7168

To be argued by
Robert G. Kuhbach



UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

FRANK SANTOS, CARL GUERRIERRI, and MARIO VOZZO, each of them individually and on behalf of all other persons, members of local unions affiliated with Painters' District Council #9 of New York City and the International Brotherhood of Painters and Allied Trades, employed or seeking employment as woodwork finishers within New York City, similarly situated,

Appellants,

-v.-

DISTRICT COUNCIL OF NEW YORK CITY AND VICINITY OF UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,

Appellee.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK GRANTING SUMMARY JUDGMENT FOR THE DEFENDANT.

APPELLEE'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

CASES: Page

STATUTES:

TREATISES:

LAW REVIEW ARTICLES:

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-v.-	:	
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Appellee,	:	

APPELLEE'S BRIEF

I. ISSUE PRESENTED

Since Article XX of the AFL-CIO Constitution was in no way intended to benefit individuals, like appellants, and since appellants have suffered no harm, do not appellants lack standing to sue another affiliate of the AFL-CIO on the basis of Article XX of said Constitution; but even if they do have standing, are not such appellants barred from bringing such a suit by the very language of Section 20 of Article XX which prohibits such an action based on a limited arbitrator's award between two affiliates of the AFL-CIO?

II. STATEMENT OF THE CASE

A. Preliminary Statement

Appellants Frank Santos, Carl Guerrierri and Mario Vozzo ("Santos"), in their class action complaint filed on behalf of themselves and all members of certain local unions affiliated with District Council No. 9 of New York City of the International Brotherhood of Painters and Allied Trades (the "Painters Union"), stated only one cause of action against the defendant District Council of New York City and Vicinity of United Brotherhood of Carpenters and Joiners of America, AFL-CIO (the "Carpenters Union"), claiming in essence that the Carpenters Union allegedly breached a determination made by Impartial Umpire Cole pursuant to the "Settlement of Internal Disputes" procedures of Article XX of the AFL-CIO Constitution. Santos asked for various forms of relief, principally, a declaration that the Carpenters' assertion of jurisdiction over "wood finishing work done and bargaining rights on behalf of persons performing such work" in certain woodworking shops in New York City is in violation of the AFL-CIO Constitution, an injunction preventing the Carpenters Union from representing woodwork finishers in certain woodworking shops, and monetary damages (Joint Appendix ["J.A."], pp. 14a-15a).

The Carpenters Union moved below to dismiss Santos' complaint, basically on the grounds that (1) Section 20 of Article XX of the AFL-CIO Constitution bars any affiliate from proceeding in court as to any disciplinary matter covered by Article XX, or any determination made pursuant thereto, and

thus Santos is barred from bring this action, (2) Santos has no standing to assert the claims which they assert in this class action, and (3) the Federal courts lack subject matter jurisdiction in this particular case. The District Court granted summary judgment for the Carpenters Union on the first ground enunciated above (J.A. pp. 63a-67a).

B. Background and Nature of the Action

Since the facts relevant to this case were fully presented below in the Affidavit of Conrad F. Olsen (J.A. pp. 25a-43a), we will include here just a summary of certain key matters pertinent to this Court's determination of this appeal.

The basis of this action goes back many years and concerns the relationship between the Manufacturing Woodworkers Association of Greater New York, Inc. (the "Association"), the Carpenters Union and the Painters Union. Members of the Association are in the business of manufacturing wooden furniture in over 40 shops located in the City of New York. For over twenty-five years, the Carpenters Union had represented all of the production workers of the members of the Association pursuant to various collective bargaining agreements, including, by 1967, a majority of those employees engaged in "woodfinishing," who shall be referred to hereinafter as "wood finishers." By 1967, the Painters Union, which had always represented only "wood finishers," was the bargaining agent for a minority of the "wood finishers" working in Association shops. (J.A. p p. 26a-27a)."

On June 30, 1967, the Carpenters Union's and Painters

Union's contracts with the Association expired. Two days prior to that date, the Carpenters Union and the Association had agreed on a new contract which for the first time specifically mentioned the classification "wood finishers" as a category of production employee to be represented exclusively by the Carpenters Union, although the Carpenters Union had in fact represented such workers for years, as mentioned above (J.A. pp. 28a-29a).

After the Carpenters Union and the Association had reached an agreement, the Association ceased negotiations with the Painters Union and a strike by the Painters Union ensued. The strike ended on August 14, 1967 after the Association had basically agreed with the Painters Union on economic terms and was willing to continue to bargain in the future on other matters still in dispute (J.A. 29a-30a).

In the fall of 1967, the Association proposed various contracts with the Painters Union which, unlike earlier agreements, did not contain an exclusive recognition provision. The Painters Union rejected these proposed contracts (J.A. 30a-31a).

Negotiations continued between the Painters Union and the Association through the last half of 1967, and into August, 1968. At that time, the Painters Union filed "unfair labor practices" charges with the National Labor Relations Board ("NLRB") against the Association (the "ULP Case"), claiming that the 1967 contract with the Carpenters Union was illegal, that the Association bargained in bad faith with the Painters Union and that the Association had given the Carpenters Union illegal

assistance in obtaining the 1967 contract. Although the Trial Examiner sustained the Painters Union's position, a three-member panel of the NLRB disagreed and dismissed the Painters Union's complaint in its entirety, finding that the Association had no obligation to recognize the Painters Union as the exclusive representative of any wood finishers (J.A., pp. 31a, 38a-39a).

After commencement of the ULP Case, the Painters Union filed a petition with the NLRB in October, 1968 (the "Unit Clarification Case"), asking that the Board clarify the bargaining unit between the Association and the Carpenters Union. After substantial review and hearings, the NLRB affirmed the dismissal of this proceeding as well, concluding that a unit clarification proceeding was inappropriate to resolve a dispute concerning the appropriate representative of "wood finishers", and that in any event, the Carpenters Union, and not the Painters Union, had a contractual right to be the recognized representative of the wood finishers (J.A., pp. 31a-32a; 34a-35a).

Since the conclusion of these NLRB cases, the Association has made absolutely clear that they will not under any circumstances recognize and/or bargain with the Painters Union (J.A., pp. 36a, 40a-41a).

Before these actions were decided by the NLRB adversely to its interests, the Painters Union resumed their strike against the Association in March, 1969. On April 10, 1969, the Painters Union, acting through their parent, the Brotherhood of Painters, Decorators and Paperhangers of America ("Painters

Brotherhood"), filed a complaint with the AFL-CIO as provided for under Article XX of the AFL-CIO Constitution, alleging that the Carpenters Union had violated Sections 2 and 3 of Article XX (J.A., pp. 32a-33a).

Impartial Umpire Cole was appointed and hearings began on May 23, 1969. After the hearings ended, Umpire Cole rendered a decision on September 4, 1969 (the "Cole Determination"), concluding that the Carpenters Union had not violated Section 2, thereby upholding the Carpenters Union's established collective bargaining relationship with the Association as the duly authorized representative of all employees, including, specifically, the "wood finishers". However, he did find that at 17 of the 21 shops in dispute, the Painters Union's complaint as to Section 3 violations was sustained (J.A., pp. 17a-21a).

The Painters Union and the Carpenters Union have pursued and continue to pursue a resolution of this matter in accordance with Article XX, including appearances before a subcommittee of the Executive Council of the AFL-CIO, recognizing, nevertheless, that any resolution between themselves is clearly futile given the Association's position vis-a-vis the Painters Union (J.A., pp. 39a-41a).

C. The AFL-CIO Constitution

It has been conceded by both Santos and the Carpenters Union that all of the terms and conditions of the AFL-CIO Constitution (the "Constitution") are binding on both the Painters Union and the Carpenters Union. Since the Constitution is at the

very center of this appeal and in fact constitutes the sole legal basis for this case, several points should be made with regard thereto (A copy of the AFL-CIO Constitution ["Const."] has been stipulated into the Record on Appeal in this case).

By its terms, the Constitution established a federation based on the merger of the American Federation of Labor and the Congress of Industrial Organizations. (See Preamble and Art. I, Const.). This federation consists of, and is composed of, affiliates, which can be local, national or international unions, national councils, state and local central bodies, and trade and industrial departments (Art I., Art III. § 1, Const.). No individuals are members nor can a person become so. No individuals are granted any specific personal rights under the Constitution. The supreme governing body of the federation is the convention, held regularly every two years (Art. IV, Const.). Between conventions, the Executive Council, consisting of the President, the Secretary-Treasurer and 27 Vice Presidents, governs the federation (Art. VIII, Const.).

A perusal of the Constitution indicates that one of the principal considerations of, and purposes for the federation is the maintenance of peace among affiliates (See Art. II, §§ 8, 11; Art. III, particularly §§ 3, 4, 7, 10; Art. XVII, §§ 23; Art. XX, Const.). In that context, Article XX entitled "Settlement of Internal Disputes" prescribes certain rights and procedures with regard to the method of handling jurisdictional disputes between affiliates, including filing charges, the appointment of an

Impartial Umpire, and the rendering of determinations by such Umpire.

The enforcement of such determinations is specifically covered by Section 15 of Article XX which details all of the sanctions to be imposed on an affiliate after the Executive Council of the AFL-CIO has made a finding that such affiliate has not complied with the Umpire's determination. Four of the sanctions are apparently mandatory, and three more are purely discretionary. All of the sanctions provide for various degrees of disenfranchisement and ostracism of the offending affiliate, but none calls for monetary damages or grants any individual any relief whatsoever (Section 15(1)-(7), Const.).

Article XX of the Constitution concludes with the following caveat:

> "Sec. 20. The provisions of this Article with respect to the settlement and determination of disputes of the nature described in this Article shall constitute the sole and exclusive method for settlement and determination of such dispute and the provisions of this Article with respect to the enforcement of such settlements and determinations shall constitute the sole and exclusive method for such enforcement. No affiliate shall resort to court or other legal proceedings to settle or determine any disputes of the nature described in this Article or to enforce any settlement or determination reached hereunder." (J.A. 58a-59a; emphasis added)

D. The Instant Appeal

Although Santos has appealed to this Court apparently on the "narrow" issue of the legality of the above-cited Section 20 of Article XX of the Constitution, and perhaps on his standing to assert certain rights belonging only to the Painters Union, we

believe that this Court, in deciding this appeal, must not lose sight of the broad factual background discussed above, within which these "narrow" issues have arisen. Appellants and the Painters Union, in whose stead they are suing, have already had three "bites at the apple" with respect to this dispute, to-wit, two full proceedings before the NLRB and the limited arbitration before Umpire Cole. The first two they clearly lost. The last, the rather ambiguous Cole Determination which merely stated that at some point in time prior to September, 1969, the Carpenters Union was in violation of Section 3 of Article XX. In addition, the Cole Determination did not prescribe any relief or sanctions, nor, quite properly should it have done so. As noted above, any such sanctions or relief are strictly limited to those specified in Section 15, Article XX, and can only be imposed by the Executive Council of the AFL-CIO, after it has found that an affiliate has not complied with such a determination. In this case, no such finding has ever been made.

To summarize, it is clear that appellants, lacking any substantive rights under Federal or state law, are trying to convert what is otherwise an inter-union disciplinary matter of severely limited scope into a full-blown substantive course of action in an effort to reverse their failure to prevail either in their strike against the Association or in the various proceedings before the NLRB. Inasmuch as the AFL-CIO decided that disciplinary matters covered by Article XX are not to be raised in court, a provision to which each union-affiliate of the

AFL-CIO explicitly consented by its act of joining the AFL-CIO, the terms of Section 20 of Article XX should be enforced against Santos, and the lower court judgment below in favor of the Carpenters Union should be affirmed.

POINT I

SINCE THE AFL-CIO CONSTITUTION SPECIFICALLY LIMITS RESORT TO THE COURTS IN CASES INVOLVING ISSUES SUCH AS ARE PRESENT IN THE INSTANT CASE AND APPELLANTS ARE SUING HEREIN SOLELY ON THE BASIS OF THE AFL-CIO CONSTITUTION, THEY MUST BE BARRED FROM PROSECUTING THIS ACTION.

Assuming that jurisdiction exists under Section 301(a) of the Labor-Management Relations Act of 1947 (29 U.S.C. § 185(a), and that appellants have standing to initiate this action, Section 20 of Article XX of the Constitution bars the maintenance of this suit.

Santos alleges that his claim is based on a contract, to wit, the Constitution, particularly Article XX which is entitled "Settlement of Internal Disputes." As has been stated earlier, Section 20 of Article XX provides in relevant part that:

> "No affiliate shall resort to court or other legal proceedings to settle or determine any disputes of the nature described in this Article or to enforce any settlement or determination reached hereunder." (J.A. p. 59a)

In seeking judicial enforcement of the Cole Determination, Santos is in clear violation of this provision of Article XX, and thus, must be barred from bringing this action.

The clear and overriding purpose behind Article XX is to expedite settlement of disputes among unions which are members of the AFL-CIO without resort to lengthy and expensive litigation. Since general Federal labor law principles encourage the use of such procedures, the procedures involved here

must be followed, particularly where it is expressly agreed that they are to be exclusive. Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965); United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960); See 29 U.S.C. § 173(d).

Although the Constitution is clearly not a "collective bargaining agreement," cases which have dealt with the "exclusivity" of arbitration provisions in collective bargaining agreements are perhaps the most useful in determining whether the exclusive remedy provision (Section 20) of Article XX of the Constitution is enforceable.

In general, it has been stated that in cases where grievance arbitration provisions are to be final and binding, an aggrieved employee can neither relitigate his grievance nor obtain a judicial hearing. Stated somewhat differently,

> "...a union and an employer can so define an employee-member's contractual rights as to make exclusive the contractual remedies for their violation, even to the point of making unavailable a suit under 29 U S C § 185(a)" 48 Am.Jur.2d Labor and Labor Relations § 1309 at 811 (1970).

In Boone v. Armstrong Cork Co., 384 F.2d 285, 289 (5th Cir. 1967), one of the cases relied upon by the district court below, the Fifth Circuit summarized the situation thus:

> "Under some circumstances an employee may be required not only to resort to a contractually-prescribed procedure to vindicate his contractual rights but also in a subsequent § 301(a) suit may be bound by the outcome of that procedure. In Haynes v. United States Pipe & Foundry Co., 362 F.2d 414 (5th Cir., 1966) this court held that where a decision of a plant manager on a grievance matter was, under the terms of the agreement, 'final,' this decision could be asserted in bar as an affirmative

> defense in a subsequent § 301(a) action for breach of the agreement. Noting that 'when a dispute arises within the scope of a collective bargaining agreement, the parties are relegated to the remedies which they provided in their agreement,' we held that a union and an employer could so define an employee-member's contractual rights as to make the contractual remedies for their violation exclusive, even to the point of making a § 301(a) suit unavailable. See also Miller v. Spector Freight Systems, Inc., 366 F.2d 2 (1st Cir., 1966); Rushton v. Howard Sober, Inc., 198 F.Supp. 337 (W.D.Mich., 1961)." (emphasis added)

In Miller v. Spector Freight Systems, Inc., 366 F.2d 92 (1st Cir. 1966), an employee, who sought redress in the courts from an arbitrator's decision discharging him, was denied same on the grounds that the collective bargaining agreement made the arbitrator's decision final and binding. As the First Circuit stated:

> "Appellant had no contractual right not to be discharged except insofar as the collective bargaining agreement gave it to him. Unless he can show the arbitrator had no jurisdiction of this particular dispute, or some improper conduct, as in Humphrey [v. Moore, 375 U.S. 335 (1964)], he must take the entire contract, including the arbitration provisions." Id. at p. 93

See also Otero v. International Union of Electrical Workers, 474 F.2d 3 (9th Cir. 1973).

These cases confirm that appellants, asserting rights belonging only to a union, the Painters Union, can have no greater rights than Article XX provides. They are bound by the terms and conditions of that Article. Inasmuch as Section 20 of Article XX prohibits a union from resorting to court, this Court is bound to enforce the express contractual language of that Article which prohibits the maintenance of this very suit.

In rebuttal, Santos asserts that there are two grounds upon which this Court must deny enforcement of Section 20, Article XX of the Constitution. First, he contends that any contract provision barring ultimate resort to the courts is against public policy. (Point I, App. Br.). Second, he claims that such a prohibition is contrary to a Congressional policy favoring enforcement of arbitration agreements between unions (Point II, App. Br.). A brief analysis of both points, indicates that neither contention in fact rebuts the Carpenters Union's position here.

In support of their first contention, appellants initially cite Williston on Contracts, among others, for the proposition that any provision denying ultimate resort to court is against public policy and void. (App. Br. p. 7). Santos, however, overlooks the fact that this is clearly qualified in situations involving arbitration agreements (14 S. Williston, Contracts §1725 at 912 [3rd Ed. 1972]), and clearly limited in the case of fraternal organizations, to matters "involving a member's property rights in the [fraternal] order or his monetary claim against it" (S Williston, Contracts, supra at 915). Williston also confirms the equally important and, in this case, much more appropriate rule, that:

> ". . . the courts in general uphold provision in membership certificates and by-laws of fraternal or benefit associations making final the decision of the tribunals of the order as to the right of membership and other questions of internal discipline." (S. Williston, Contracts, supra at 914).

See also 36 Am. Jur. 2d. Fraternal Orders §53 at 845 (2d ed. 1968); 51 A.L.R. 1420, 1425 (1927).

We would add that it is also a well-established rule that individuals, and no doubt organizations, may waive by contract or conduct, any constitutional right or privilege, such as the right to resort to court. 16 Am. Jur. 2d Constitutional Law §131 et seq. (1964). In a case upholding a state statute providing appraisals rights for the minority dissenting shareholders, against a Federal constitutional challenge that such a provision violates the due process clause of the Fourteenth Amendment, the United States Supreme Court properly concluded that:

> They [the minority shareholders] cannot claim the benefit of statutes and afterwards successfully assert their invalidity. There is no sanctity in such a claim of constitutional right as prevents its being waived as any other claim of right may be." Wall v. Parrot Silver & Copper Co., 244 U.S. 407, 412 (1917).

So to here, the Painters Union (and hence Santos), having voluntarily joined the AFL-CIO and agreed thereby to accept the benefits of, and abide by, the Constitution, cannot now assert the right to go to court, which right it waived by the very act of joining.

Santos also cites several contract cases in support of his position that Section 20 of Article XX is alleged illegal and void as against public policy. None of these cases, however, is remotely analogous, either factually or legally, to the instant action. For example, Guaranty Trust & Safe Deposit Co. v.

Green Cove Spring & Melrose R.R., 139 U.S. 137 (1891), is, as the district court below correctly noted, clearly distinguishable and must be limited to its peculiar facts. In McCullough v.Clinch-Mitchell Construction Co., 71 F.2d 17 (8th Cir. 1934), the court acted solely because one of two contracting parties refused to participate in an arbitration which it had been agreed, would be the sole method of dispute resolution under a construction contract. Enforcement of an arbitration award was not even at issue. In Beuttas v. United States, 60 F.Supp. 771 (Ct. Cl. 1944), rev'd on other grounds, 324 U.S. 768 (1945), the court intervened to void an agreement which clearly was not even an arbitration agreement because it left the resolution of all disputes to one of the two principals to the contract.

The next four cases relied on by appellants (App. Br., p. 9) involve a collective bargaining agreement, a partnership agreement, and construction contracts, all of which situations are factually distinguishable. In Matter of Brown v. Order of Foresters, 176 N.Y. 132 (1903), Brown, allegedly expelled in violation of the Foresters' own constitution and by-laws, was allowed to sue because he was a direct member of the Forresters, a fraternal organization whose primary purpose was to provide its members insurance, because he had certain clearly defined personal rights under its constitution, and because he had a personal, financial interest in the outcome, all factors not present here.

Without reviewing in detail the few remaining autho-

rities relied on by Santos in Point I of his Brief, suffice it to say that none of them, nor in fact have appellants cited a single case anywhere in their brief, which deals with a suit based on a provision like Article XX of the Constitution which by its terms grants no personal rights to any individual. To the contrary, Santos has have sought to rely on cases where individual rights were involved in local union disciplinary proceedings and local union elections, all of which are irrelevant in the present context.

As to Point II of his brief, Santos asserts that Federal courts, having jurisdiction under Section 301(a) of the Labor-Management Relations Act of 1947 (29 U.S.C. 185(a) over disputes such as are involved in the instant case, must, applying the substantive Congressional policy inherent in Section 301(a) of enforcing arbitration agreements, override Section 20 of Article XX of the Constitution and thereby permit enforcement of the Cole Determination, rendered pursuant to Section 3 of Article XX. In support of this argument, Santos relies on quite a few cases. Without commenting initially on all of the authorities cited by appellants, we believe that a couple of general observations are in order with regard to appellants' position as applied to this case.

Recognizing that jurisdiction over certain kinds of agreements between labor organizations has been sustained in very limited circumstances (Parks v. International Brotherhood of Electrical Workers 314 F.2d 886, 914-916 (4th Cir. 1963), cert. den. 372 U.S. 976 (1963)), the Carpenters Union believes that the record is decidedly unclear as to whether the instant case is the

type of case which Congress ever intended be covered by Section 301(a). As Judge Medina property noted, in a case similar yet distinguishable from the instant one:

> "The plain truth of the matter is that the Congress adopted the clause 'or between any such labor organizations,' without any realization of the Pandora's box it was thus opening up, and the most diligent examination of the legislative history turns up nothing of real significance that is relevant to the matter under discussion" (footnote and cite omitted) Local 33, International Hod Carriers, etc. v. Mason Tenders, etc., 291 F.2d 496 (2d Cir. 1961), p. 503.

(See generally Applying the "Contracts Between Labor Organizations" Clause of Taft-Hartley Section 301: A Plea for Restraint, 69 Yale L.J. 299 (1959) pp. 299-308).

The most obvious problem which has arisen under Section 301(a) is the conflict between the jurisdiction of the Federal Courts and that of the NLRB, particularly when questions of "pre-emption" arise in the context of the any "dispute-resolution" involving rights arguably within the scope of the NLRB's authority. This Court, facing the jurisdictional conflict in a case remarkably similar to the instant action, recognized the problem:

> "This [suit by plaintiffs, former members of the Steelworkers Union, against the Sheet Metal Workers Union to enforce the provisions of a no-raiding agreement giving the Steelworkers Union exclusive representational rights] raises an issue of both jurisdiction and enforceability, upon which there has been no clearcut decision. In United Textile Workers of America, AFL-CIO v. Textile Workers Union of America, 258 F.2d 743 (7th Cir. 1958), the Seventh Circuit held that an arbitration award pursuant to a no-raiding agreement was enforceable, while two years later Judge Mathes

of the District Court of California decided in International Union of Doll & Toy Workers of United States and Canada, AFL-CIO v. Metal Polishers, Buffers, Platers & Helpers International Union, AFL-CIO, 180 F.Supp. 280 (S.D. Cal.1960), that, with due respect to United Textile Workers and the literal reading of § 301(a), the Congressional policy developed under the National Labor Relations Act conferred exclusive jurisdiction over such agreements upon the NLRB and that the district court therefore lacked jurisdiction to enforce the same. As a matter of practice, the NLRB has refused to automatically enforce such agreements upon the ground that to do so 'would permit a private resolution of the question concerning representation in a manner contrary to the policies of the [National Labor Relations] Act and would impinge upon the Board's exclusive jurisdiction and authority to resolve such questions of representation.' Great Lakes Industries, Inc. (Cadmium & Nickel Plating Div.), 124 NLRB 353 (1959). Subsequently, in 1962, the Supreme Court in Retail Clerks International Association, supra, cited United Textile Workers as an example of labor contracts other than collective bargaining agreements subject to § 301 jurisdiction. In an entirely different context, we noted in Lodge 743, International Association of Machinists, AFL-CIO v. United Aircraft Corporation, 337 F.2d 5 (2d Cir. 1964), cert. denied, 380 U.S. 908, 85 S.Ct. 893, 13 L.Ed.2d 797 (1965), that the same Court of Appeals which decided United Textile Workers seriously questioned the blanket enforceability of no-raiding agreements notwithstanding § 301 jurisdiction (National Labor Relations Board v. Weyerhaeuser Company, 276 F.2d 865 (7th Cir. 1960), cert. denied, 364 U.S. 879, 81 S.Ct. 168, 5 L.Ed.2d 102 (1960)), and prior thereto we remarked in Local 33, International Hod Carriers, etc. v. Mason Tenders, etc., supra, 291 F.2d at 503, that the enforcement of a no-raiding agreement pursuant to § 301 may impinge upon the 'clearly established activities of the NLRB,' requiring the district court to stay its hand." (emphasis added) Abrams v. Carrier Corp., 436 F.2d 1234, 1249 (2d Cir. 1970), cert. denied, 401 U.S. 1009 (1971).

See also International Union of Doll & Toy Workers of United States and Canada, AFL-CIO v. Metal Polishers, Buffers, Platers &

Helpers International Union, AFL-CIO, 180 F. Supp. 280 (S.D. Cal. 1960).

In the instant case, the conflict between the NLRB and the Federal courts is clearly a present and pervasive problem given the NLRB rulings in the ULP and Unit Clarification Cases on the one hand, and Santos seeking enforcement of the Cole Determination on the other. Although this conflict is not an issue on appeal here, courts in similar circumstances, recognizing that such a conflict is a thorny matter, have nevertheless supported the NLRB's position over the determination of a private arbitrator. Carey v. Westinghouse Corporation, 375 U.S. 261, 270-272 (1964); Local 425 Office and Professional Emp. Int. U., AFL-CIO v. NLRB, 419 F.2d 314, 317-320 (D.C. Cir. 1969); NLRB v. Local 282, Teamsters, 344 F.2d 649, 652 (2d Cir. 1965); NLRB v. Auburn Rubber Company, 384 F.2d 1, 3 (10th Cir. 1967); see particularly Local 7-210, Oil, Chemical & Atomic Workers v. Union Tank Car Co., 475 F.2d 194 (7th Cir. 1973; reh. den en banc April 27, 1973), cert. denied 414 U.S. 875 (1973); Boire v. International Brotherhood of Teamsters, 479 F.2d 778 (5th Cir. 1973); and Local 1547, IBEW v. Local 959, Teamsters, 507 F.2d 872 (9th Cir. 1975) and cases cited therein.

Returning to the specific cases relied upon by Santos, suffice it to say that all but three of the cases cited are wholly distinguishable on their facts in that they concern disputes based on clearly defined individual rights granted union members under collective bargaining agreements and/or arbitration agreements or awards related thereto.

Of the three cases arguably relevant because they are based on a union constitution or a "no-raiding agreement", United Textile Workers v. Textile Workers Union, 258 F.2d 743 (7th Cir. 1958), involved enforcement of an award by umpire David L. Cole (the same man whose Determination is at issue here) who had held that the defendant union had violated the AFL-CIO No-Raiding Agreement by seeking to become the bargaining agent of certain employees who were then represented by plaintiff. The case is inopposite for two reasons. The issue before the Seventh Circuit concerned the collective bargaining relationship of the plaintiff union, in a word representation of employees, unlike here where Santos insists that work-assignment is the only issue. More important, the AFL-CIO No-Raiding Agreement (not part of the AFL-CIO Constitution) specifically provided that any party to the agreement had the right to institute legal proceedings to compel compliance. (258 F.2d 743 at 744, n. 1, ¶ 8).

This same provision, authorizing a party to seek court enforcement, was present in Local 33, International Hod Carriers v. Mason Tenders District Council, 291 F.2d 496 (2d Cir. 1961), the second apparently relevant case which Santos cites. This presence of a provision for court review in the constitution of the International Hod Carriers Building and Common Laborer's Union of America clearly distinguishes that case from the instant situation. Futhermore, this Court, in upholding jurisdiction over the dispute in Mason Tenders, did so in part because they saw no likelihood of conflict with the NLRB, a situation which

has already been precluded in the instant action.

Finally, in International Brotherhood of Firemen and Oilers, AFL-CIO v. International Association of Machinists, AFL-CIO, 338 F.2d 176 (5th Cir. 1964), the issue was which of two unions was going to represent certain maintenance employees. Although the Firemen's union was duly recognized as the bargaining agent for these employees, the Machinists union sought arbitration under the AFL-CIO "No-Raid Agreement" and was held to be entitled to represent the same employees. Unlike the instant case, the NLRB had not formerly intervened and the "No-Raid Agreement" specifically allowed for resort to the courts, thereby giving the court leeway to enforce the arbitration decision in favor of the Machinists union. Here again, the case is factually inappropriate.

Inasmuch as Santos strongly avers a Congressional policy of allowing parties to resolve their differences by private agreement, so should the parties in the instant case be left to live with Article XX which explicitly excludes any judicial interference. What makes that particularly true here, is the unique nature of this case. The Carpenters Union has been affirmed by both the NLRB and, by clear implication, Umpire Cole, as the proper representative of all Association members' employees, including "wood finishers". The Painters Union, therefore, can no longer legally represent any "wood finishers". On the other hand, assuming enforcement of the Cole Determination as Santos demands, only members of the Painters Union would be

entitled to the work done by "wood finishers". Given the exclusive union shop provision of the Carpenters Union agreement with the Association, this is an impossibility, for a Painters Union member would no sooner start work as a "wood finisher" than he would be legally required to join the Carpenters Union and thus could no longer work as a "wood finisher". However, as noted above, enforcement of the Cole Determination can in no way involve such an absurd situation because the only permissable sanctions provided for under the relevant arbitration agreement (Section 15 of Article XX) which, as Santos argues, must be followed, do not countenance such relief, nor should they.

To summarize then, we have here, in what must be termed a case of first impression, a jurisdictional dispute based on Article XX of the AFL-CIO Constitution, between one union affiliate and members of another union affiliate. The facts are that no individual union member's rights are involved, that all of the procedures and sanctions for failure to comply with an umpire's determination are specifically defined, limited, and in no way inure to the benefit of individual union members, and that the sole purpose of such provisions is to maintain some semblance of inter-union order and discipline, not to grant individual union member any rights. Under these circumstances, particularly where all affiliates of the AFL-CIO have voluntarily agreed to be bound by the Executive Council's activity or inactivity in enforcing Article XX, the validity of Section 20 of Article XX of the Constitution must be upheld.

POINT II

SINCE ARTICLE XX OF THE AFL-CIO CONSTITUTION WAS CLEARLY NOT DRAFTED FOR THE BENEFIT OF APPELLANTS, AND SINCE APPELLANTS HAVE SUFFERED NO HARM, THEY LACK STANDING TO ASSERT ANY CLAIM UNDER ARTICLE XX OF THE AFL-CIO CONSTITUTION.

Beyond the contractual prohibitions discussed above, the Carpenters Union also believe, and the lower court indicated some concurrence in this regard (J.A., 66a), that Santos lacks standing to assert the claims put forward here.

This belief is based substantially on this Court's decision in Abrams v. Carrier Corp., supra. In Abrams, plaintiffs, as a class of former Steelworkers Union employees of Carrier, brought an action against Carrier, their local of the Steelworkers Union and the Sheet Metal Workers Union for various contractual violations and violations of Federal labor laws. The case was quite similar to the instant action, in that during the course of certain labor unrest, the Sheet Metal Workers Union, allegedly with the assistance of Carrier, managed to win an NLRB election and supplant the Steelworkers Union as the new bargaining agent of the Carrier Workers, whereupon the Sheet Metal Workers refused to carry over the plaintiffs' membership and seniority rights from the Steelworkers Union.

The sole basis for plaintiffs' claim against the Sheet Metal Workers Union was a provision of a "no-raiding" agreement among the International Unions of the Steelworkers, the Sheet Metal Workers and others, which provided that once one International became the representative of Carriers's

workers, the other Internationals would not attempt to supplant that International as the exclusive representative of Carrier's workers. As the Second Circuit so correctly concluded in the Abrams case,

> "We need not, however, attempt to resolve this unsettled issue [concerning jurisdiction under § 301(a)] since it is clear that the appellants, not being signatories to the [no-raiding] Agreement, have no standing to sue. Obviously, the Agreement among the five international unions was not made for the benefit of appellants but for the benefit of the particular international emerging victorious in the AFL-CIO election of July 1, 1959. Whatever legally cognizable damage resulted from the entrance of Sheet Metal Workers into the NLRB election of January 7, 1960, or from its continued agitation for membership of Local 5895, or from the certification of Local 527 on November 30, 1961, was suffered by the Steelworkers, which lost members, dues, assessments, and possibly prestige. We can see no possible harm to the appellants except disappointment that a majority of Carrier employees shifted sentiment to another union. Of course, this emotional disappointment will not justify a suit against Sheet Metal Workers pursuant to § 301 by individual employees for back pay, reinstatement of employment and union membership, together with damages caused by an allegedly unjust refusal of Carrier to rehire the appellants after a work stoppage." (Emphasis added.) Id. at pp. 1249-1250

Likewise here, the Settlement of Internal Disputes' procedures of Article XX of the Constitution, were clearly not intended to benefit individual local union members, but rather to preserve peace among the various union affiliates of the AFL-CIO. In this case, the Carpenters claimed the right to become the exclusive collective bargaining representative of the "wood finishers", a right which was affirmed by both the NLRB and, by clear implication, even Impartial Umpire Cole. The only party to suffer any damage is the Painters Union which, like the Steelworkers in Abrams, has lost "members, dues, assessments,

and possibly prestige". And appellants in this action, like the plaintiffs in Abrams, have similarly suffered only "emotional disappointment", which will not justify a suit against the Carpenters Union for any of the damages which appellants are claiming in this action.

Since Santos lacks standing, the dismissal of this action must be affirmed.

CONCLUSION

For the reasons stated herein, it is respectfully submitted that the decision of the United States District Court below, granting the Carpenters Union's motion for summary judgment, should be affirmed.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

FRANK SANTOS, CARL GURRIERRI and MARIO VOZZO, each of them individually, etc.

Plaintiffs,

-against-

DISTRICT COUNCIL OF NEW YORK CITY AND VICINITY OF UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,

Defendant

- -x

AFFIDAVIT OF SERVICE ON PERSON IN CHARGE

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

CHESTER KOWALSKI, being duly sworn, says: I am employed in the office of Breed, Abbott & Morgan, 1 Chase Manhattan Plaza, New York, N.Y. 10005, attorneys for the defendant in the above action.

On the 19th day of July, 19 76, between the hours of 9:30 A.M. and 5:30 P.M., I served the annexed

APPELLEE'S BRIEF

on the attorney(s) listed below by delivering the same to and leaving the same with the person in charge of said office(s).

Burton H. Hall, Esq., Attorney for Plaintiffs, 401 Broadway, New York, N. Y. 10013

Sworn to before me this
19th day of July, 19 76

Donald L. Price

DONALD L. PRICE
NOTARY PUBLIC, State of New York
No. 24-8439300
Qualified in Kings County
Certificate Filed in New York County
Commission Expires March 30, 1978

Chester Kowalski

Chester Kowalski